

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CHRISTOPHER DIEP,

Petitioner,

v.

MATTHEW CATE et al.,

Respondents.

No. SA CV 11-01443-VBF (PLA)

**ORDER Overruling Petitioner's
Objections, Adopting the Magistrate
Judge's Report & Recommendation,
Denying the Habeas Corpus Petition, and
Dismissing the Action With Prejudice**

On August 27, 2014, the United States Magistrate Judge issued a Report and Recommendation ("R&R"), recommending that petitioner's Petition for Writ of Habeas Corpus be denied and the action dismissed with prejudice. On September 10, 2014, petitioner filed Objections to the R&R. (Docket No. 37). In the Objections, petitioner asserted, inter alia, that his claim of instructional error in Ground Three had merit because under the recent case of People v. Chiu, 59 Cal.4th 155, 172 Cal.Rptr.3d 438 (2014), "[i]t is now clear law in California that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine; rather, his or her liability for that crime must be based on direct aiding and abetting principles." (Objections at 7).¹ On October 17, 2014, respondent filed a

¹ In 2006, petitioner was convicted of first degree murder as an aider and abettor pursuant to the natural and probable consequences theory, street terrorism, a firearm enhancement, and a gang enhancement, and was sentenced to a total term of fifty years to life. (See R&R at 2, 23-

1 Response to the Objections. (Docket No. 41). On October 20, 2014, petitioner filed a Reply to
2 respondent's Response, in which petitioner requested that the Court grant habeas relief or,
3 alternatively, stay the Petition while petitioner returned to state court to raise the Chiu claim.
4 (Docket No. 42).

5 On October 22, 2014, the Magistrate Judge ordered that the Petition be stayed and held
6 in abeyance while petitioner returned to state court to present his constitutional claims under Chiu.
7 (Docket No. 43). On November 10, 2014, petitioner filed a habeas petition in the Orange County
8 Superior Court in which he challenged, pursuant to Chiu, the validity of both his first degree
9 murder conviction and the firearm enhancement. (Docket Nos. 44, 50). The superior court
10 denied petitioner's challenge to the firearm enhancement, but found merit to his claim challenging
11 the first degree murder conviction and granted habeas relief. As a result, petitioner's judgment
12 was modified to reflect a second degree murder conviction with a sentence of fifteen years to life,
13 for a total term of forty years to life. (Docket No. 53). Petitioner next filed a habeas petition in the
14 California Court of Appeal, challenging the trial court's denial of his Chiu claim regarding the gun
15 enhancement. On June 25, 2015, the court of appeal denied the petition. (Id.). On September
16 6, 2015, petitioner filed a status report stating that he would not be seeking habeas relief in the
17 California Supreme Court, and that his state court litigation pursuant to Chiu had concluded.
18 (Docket No. 56). On September 16, 2015, the stay in this matter was lifted. (Docket No. 57).

19 The Court now considers petitioner's Objections to the R&R in light of the state court's
20 grant of habeas relief pursuant to Chiu and the fact that petitioner now has a conviction for second
21 degree murder. The grant of state habeas relief rendered moot petitioner's claim of instructional
22 error as set forth in Ground Three of the Petition. As for petitioner's remaining claims, based on
23 a careful review of the record, the Court concludes that petitioner has not demonstrated a basis
24 for habeas relief. Accordingly, for Grounds One, Two, Four, Five and Six, the Court finds that
25 petitioner's Objections are without merit.

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CONCLUSION

Based on the foregoing and pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file records herein, the Magistrate Judge's Report and Recommendation, and petitioner's objections to the Report and Recommendation. The Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court concurs with and accepts the findings and conclusions of the Magistrate Judge, except as noted below. ACCORDINGLY, IT IS ORDERED:

The Report and Recommendation is ADOPTED as to all grounds for relief raised in the Petition, except as to Ground Three.

The claim for relief in Ground Three is DENIED AS MOOT.

The Court will rule on a certificate of appealability by separate document.

Final judgment consistent with this order will be entered in favor of respondents and against petitioner. As required by Fed. R. Civ. P. 58(a), judgment will be entered by separate document.

This action is dismissed with prejudice and the case is TERMINATED.

The clerk shall serve this Order and the Judgment on all counsel or parties of record.

DATED: October 8, 2015



HONORABLE VALERIE BAKER FAIRBANK
SENIOR UNITED STATES DISTRICT JUDGE